



4310-05-P

DEPARTMENT OF INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

**[PA-170-FOR; Docket ID: OSM-2018-0007 S1D1S SS08011000 SX064A000
190S180110; S2D2S SS08011000 SX064A000 19XS501520]**

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on a request to remove a required amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a request to remove a required amendment to the Pennsylvania regulatory program, hereinafter the Pennsylvania program, under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania provided a rationale it believes supports its position that an amendment we required related to the timing of the reclamation of temporary storm water control facilities (siltation structures) should be removed. This document gives the times and locations that the Pennsylvania program and this request are available for your inspection, the comment period during which you may submit written comments, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this request until 4:00 p.m., Eastern Standard Time (e.s.t.), [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If requested, we will hold a public hearing on the request on [INSERT DATE 25 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. We will accept requests to speak at a hearing until 4:00 p.m., e.s.t. on [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by SATS No. PA-170-FOR, Docket ID: OSM-2018-0007, by any of the following methods:

- Mail/Hand Delivery: Mr. Ben Owens, Chief, Pittsburgh Field Division
Office of Surface Mining Reclamation and Enforcement
3 Parkway Center, Pittsburgh, Pa 15220
- Fax: (412) 937-2177
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Pennsylvania program, this request, a listing of any scheduled public hearings, and all written comments received in

response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the request by contacting OSMRE's Pittsburgh Field Division or the full text of the request is available for you to read at www.regulations.gov.

Ms. Ben Owens, Chief, Pittsburgh Field Division
Office of Surface Mining Reclamation and Enforcement
3 Parkway Center
Pittsburgh, Pa 15220
Telephone: (412) 937-2827
Email: bowens@osmre.gov

In addition, you may review a copy of the request during regular business hours at the following location:

Mr. William S. Allen Jr., Director, Bureau of Mining Programs
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market St.
Harrisburg, Pa 17105-8461
Telephone: (717) 787-5103
Email: wallen@pa.gov

FOR FURTHER INFORMATION CONTACT:

Mr. Ben Owens, Chief, Pittsburgh Field Division

Office of Surface Mining Reclamation and Enforcement

3 Parkway Center

Pittsburgh, Pa 15220

Telephone: (412) 937-2827

Email: *bowens@osmre.gov*

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. Description of the Request
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program effective July 31, 1982. You can find additional background information on the Pennsylvania program, including the

Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register**, (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15, and 938.16.

II. Description of the Request

By letter dated August 9, 2018, Pennsylvania sent us rationale it believes supports its request that a program amendment OSMRE required on November 7, 1997, at 30 CFR 938.16(rrr), which involves hydrologic balance protections and siltation structures, be removed (Administrative Record No. PA 903.00). *See* 62 FR 60172. The Federal regulations at 30 CFR parts 816 and 817 (Permanent Program Performance Standards for surface mining and underground mining respectively) include requirements for protection of the hydrologic balance within the permit and adjacent areas and to prevent material damage to the hydrologic balance outside the permit area during mining and reclamation activities. The standards address ground-water quality and surface water protections and include the requirement that additional contributions of suspended solids sediment to streamflow or runoff outside the permit area be prevented to the extent possible. One of the mechanisms used to address this requirement is the construction of siltation structures, which include sedimentation ponds. These ponds are designed, constructed and maintained to provide adequate sediment storage volume and adequate detention time to allow the effluent from the ponds to meet State and Federal effluent limitations.

In 1996, through a program amendment request, Pennsylvania proposed requiring that sedimentation ponds be maintained until the disturbed area is stabilized and revegetated and removal is approved by the Department of Environmental Protection (herein referred to as the “Department”). The regulation also added that ponds may not be removed sooner than two years after the last augmented seeding, unless the Department finds that the disturbed area has been sufficiently revegetated and stabilized. The regulations at 30 CFR 816.46(b)(5), *Hydrologic balance: Siltation structures, general requirements* (applicable to surface mining) and 817.46(b)(5), (applicable to underground mining), specifically prohibit the removal of siltation structures (e.g., sedimentation ponds) sooner than two years after the last augmented seeding. Therefore OSMRE imposed a requirement at 938.16(rrr) that Pennsylvania submit a program amendment to 25 Pennsylvania Code (Pa Code) subsections 87.108(c), *Hydrologic balance: sedimentation ponds* (applicable to surface coal mining), 89.24(c), *Performance Standards: Sedimentation ponds* (applicable to underground coal mining), and 90.108(c), *Hydrologic balance: sedimentation ponds* (applicable to coal refuse disposal sites), or otherwise amend its program to require, without exception, that sedimentation ponds not be removed sooner than two years after the last augmented seeding.

Pennsylvania states that it included language requiring the two-year limitation in 1995 when it submitted the regulation to the Pennsylvania Environmental Quality Board (EQB) for review and approval, but the EQB revised the proposed regulation and added an exception to allow removal of the siltation structures sooner than the two-year time

frame. The EQB provided an exception to the two-year limitation and allowed removal when the Department determines that the reclaimed area has been sufficiently revegetated and stabilized. Pennsylvania states the basis for the EQB allowing a lesser period of time was that a properly managed site will normally be revegetated and stabilized within one year and as few as eight months when ideal conditions exist.

With this request, Pennsylvania provides rationale it contends supports its position that the required amendment be removed. Pennsylvania presents the following four reasons why the required amendment should be removed.

1. The Federal regulations and Pennsylvania regulations require the approval by the regulatory authority before siltation structures can be removed. Pennsylvania reasons that its regulations at §§ 87.108(c), 89.24(c), and 90.108(c) require the regulatory authority to approve the removal of the ponds as required by Federal regulation.

2. Pennsylvania's approved program requires the use of the Best Technology Currently Available (BTCA) to prevent erosion and sedimentation and that vegetation can serve as BTCA. Pennsylvania refers to the Federal regulation at § 816.46(b)(1), which requires additional contributions of suspended sediment to streamflow or runoff outside the permit area be prevented to the extent possible using the BTCA.

Pennsylvania points out that the Federal requirement at 816.46(b)(2) that existed in 1986 required all surface drainage from the disturbed area be passed through a siltation structure before leaving the permit area, but the regulation was suspended on December 22, 1986, due to a 1985 court order. *See* the November 20, 1986, **Federal Register** (51

FR 41952, 51957). The regulation was suspended due to litigation that resulted in the determination that the preamble to the regulations failed to provide a sufficient rationale for requiring siltation structures in every instance. *In re Permanent Surface Mining Reclamation Litigation*, 620 F. Supp. 1519, 1568 (1985). Pennsylvania states the result of the suspension is that the regulation at 816.46(b)(1) is now the governing regulation. Pennsylvania asserts the regulation only requires the use of BTCA, when possible, and that vegetation serves as the BTCA where successful vegetation has served to meet the sedimentation control requirements. The vegetation is intended to assure drainage meets effluent limits and does not contribute suspended solids to the streamflow.

Regarding surface mines and coal refuse disposal facilities, Pennsylvania states its approved program at §§ 87.108(i) and 90.108(j), respectively, requires the implementation of BTCA upon reclamation of the sedimentation ponds, which is consistent with § 816.46(b)(1). Pennsylvania points to the regulations at these sections, which provide when a sedimentation pond is to be removed, the affected land shall be regraded and revegetated in accordance with §§ 87.147 and 90.151, *Revegetation: general requirements*, (applicable to surface mining and coal refuse disposal sites respectively). Pennsylvania specifically references subsections (c) and (d) of §§ 87.147 and 90.151, which require that revegetation provide a quick germinating, fast-growing, vegetative cover capable of stabilizing the soil surface from erosion; be completed in compliance with the reclamation plan as approved by Pennsylvania in the permit; and be carried out in a manner that encourages a prompt vegetative cover and recovery of

productivity levels compatible with the approved postmining land use.

Regarding underground mining, Pennsylvania refers to the general revegetation requirements in § 89.86, *Performance Standards: Revegetation* which provide for implementation of BTCA for the reclamation of stormwater controls. It notes that this section is applicable to all reclamation, including the reclamation of stormwater controls. Pennsylvania also notes the specific requirements in subsections (c) and (d), which address seeding, planting, mulching, and other soil stabilizing practices.

Pennsylvania asserts at least two states (Ohio and Montana) have amended their programs and received OSMRE approval to allow removal of sedimentation ponds sooner than two years after last augmented seeding if replaced by BTCA and, in these cases, the BTCA includes sediment control measures, in the form of vegetation. *See* the November 15, 1994, **Federal Register** (59 FR 58778) and the May 11, 1990, **Federal Register** (55 FR 19727), respectively.

3. Based on Pennsylvania's experience, revegetation is often established in less than two years. Further, Pennsylvania adds that because siltation structures pose reclamation liability, and in some cases a potential public safety hazard, they should be removed as soon as they are no longer necessary, which is often less than two years.

4. There is no statutory prohibition to Pennsylvania's approach.

In conclusion, Pennsylvania asserts that its program is no less effective than the Federal program for all the reasons mentioned above and requests the required amendment be removed.

The full text of the justification to remove the required amendment is available for you to read at the locations listed above under **ADDRESSES** or at www.regulations.gov.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the justification is sufficient to remove the required amendment at 30 CFR 938.16(rrr). If we approve the request, we will remove the provision at 938.16(rrr).

Electronic or Written Comments

If you submit written or electronic comments on the request during the 30-day comment period, they should be specific, confined to issues pertinent to the request, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence our decision will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information, may be made publicly available at any

time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., e.s.t. on [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak, and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR**

FURTHER INFORMATION CONTACT. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12866 - Regulatory Planning and Review

Pursuant to Office of Management and Budget (OMB) Guidance dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We will conclude our review of the request for removal of the required amendment after the close of the public comment period and determine whether the amendment should be removed.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 5, 2018.

Thomas D. Shope,
Regional Director,
Appalachian Region.

EDITORIAL NOTE: This document was received for publication by the Office of the Federal Register on April 26, 2019.

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